In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 14

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

ATLANTIC COAST LINE R. CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES AS *AMICUS CURIAE*

In our principal brief in the instant case, and in the Brief for the United States and the Federal Maritime Commission in No. 63, this Term, *Philip R. Consolo* v. *Flota Mercante Grancolombiana, S.A.* (dealing with the same issue in a slightly different context), we argue that a carrier ordered to pay reparations can test the administrative order only in a proceeding instituted by the injured shipper to enforce the reparations award (under Section 16(2) of

the Interstate Commerce Act, in the case of a shipper by rail, and that the carrier may not initiate his own action under 28 U.S.C. 1336—as in the case of other Commission orders—to set aside the reparations order. Our reasoning, to recapitulate briefly, is as follows:

Commission orders prescribing future conduct have generally a continuing significance and substantial public importance. Therefore, they are enforceable by the Commission itself and are reviewable by means of actions to set aside the Commission's order, which are brought in three-judge district courts with a right of direct appeal to the Supreme Court and defended by the Commission. Reparations orders, however, ordinarily lack such general significance. They are limited to adjudicating past practices and assessing the damages sustained by persons injured thereby. Hence, the procedures for judicial review are different. Section 16(2) of the Interstate Commerce Act provides a special procedure for the shipper to enforce a reparations order running in his favor, and the agency is not empowered to enforce such orders at all. In the shipper's enforcement action he receives special procedural advantages: he is given the choice of venue; he will recover costs (save as they may accrue on his appeal); if he prevails, he will be awarded a reasonable attorney's fee; and the burden of proof is shifted to his adversary by a provision that makes the Commission's findings and order in the administrative reparations proceeding *prima facie* evi-

dence in the enforcement action. Moreover, other similarly situated shippers may collect damages under the reparations decision without proceeding first before the Commission.

The theory behind the special treatment accorded reparations orders is apparent. Because they lack the general public interest of other agency orders (as attested by the fact that, where reviewable at all in a suit by the carrier, reparations orders are never heard by a three-judge panel in the district court, as in the case of other orders), the Commission is not intended to be a party to a reparations proceeding at any stage; its function in regard to such a proceeding is merely to provide an expert tribunal to hear and decide an essentially private dispute between shipper and carrier. But, with the Commission thus relieved of any responsibility for enforcing the reparations orders which it issues, the shipper is left alone to bear the burden of enforcement. To make the burden bearable—recognizing that, as a class, shippers are at a disadvantage in litigation with carriers—the statute provides special procedural advantages to the shipper.

In short, the procedural scheme for dealing with reparations orders has two complementary objectives: (1) to relieve the agency of the responsibility of a party, and (2) to give the shipper sufficient procedural advantages to enable him to enforce the reparations order without the help of the agency.

This careful and practical design would be fatally disrupted by granting the carrier the right to sue to set aside the reparations order. It would inject the

agency into the proceedings as a party, because an action under 28 U.S.C. 1336 to set aside a Commission order is brought against the United States and the Commission. Further, unless the agency assumes the full burden of defense in that action, the shipper must intervene and participate fully in the proceeding—where he is entitled to none of the special procedural advantages that Congress deemed necessary to enable him to maintain an enforcement action. If in the direct review proceeding the reparations order is upheld, the shipper must still bring suit to enforce the order; the agency is without jurisdiction to bring an enforcement action with respect to orders of this type. And if the order is set aside in the direct review proceeding, other shippers are thereby foreclosed from making use of it. On the other hand, the carrier loses nothing if required to challenge a reparations order solely by way of defense to the shipper's enforcement action. For he is entitled to receive in that action prompt and complete judicial review of the validity and enforceability of the agency's order.

Respondents reply to our arguments essentially as follows: (1) A reparations order is no mere abstract declaration, but a final administrative order under the doctrine of *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125; therefore, it is subject to judicial review. (2) Section 16(2), however, affords no opportunity for judicial review. It is a damages, not a review, provision. In the shipper's enforcement action under that Section, the administrative finding of illegal conduct by the carrier underlying the repara-

tions order is conclusive. (3) Hence, the carrier is entitled to invoke the direct-review procedure, 28 U.S.C. 1336, as indicated by this Court's decision in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, a case involving a Commission order denying (rather than, as here, granting) reparations to the shipper.

We grant the first premise of this rebuttal—that an order granting reparations is final and fully ripe for purposes of judicial review. We grant that the carrier is entitled to judicial review of such an order —if not in a Section 16(2) proceeding, then, as *United States* v. *Interstate Commerce Commission* teaches, in an action under 28 U.S.C. 1336. And we grant that, read literally, the language of Section 1336—which speaks of "any order"—is broad enough to embrace reparations orders. But respondents' conclusions do not follow from these premises.

Contrary to respondents' contention, Section 16(2) (as we explain in detail at pages 28-37 of our brief in *Consolo*) is designed to afford the carrier against which a suit to enforce a reparations order is brought a complete opportunity for judicial review of the order. The agency's findings are conclusive in such an action only in the same sense that they would be conclusive in a direct review proceeding as well: insofar as they determine questions within the primary jurisdiction of the Interstate Commerce Commission, they may not be re-examined *de novo* in the judicial action, although they may be reviewed by the court. From the carrier's standpoint, the only difference between judicial review in an enforcement action as

against a direct review action is that in the former the court may invalidate the agency's order only as between the parties and may not set aside the order altogether. But the carrier has no cause to complain. Normally, a judgment is *res judicata* only as between the actual parties to the proceeding and is not binding on non-parties—in this context other shippers—who do not and are not required to participate.

That the carrier has a right to judicial review of the agency's order in the enforcement action disposes of the contention that *United States* v. *Interstate Commerce Commission* justifies or requires that an order granting reparations be reviewable under 28 U.S.C. 1336. There, to be sure, this Court allowed the shipper to bring a Section 1336 action to set aside a Commission order *denying* (not, as here, granting) reparations. But the choice in that case was between judicial review of the agency's order in a Section 1336 proceeding and no judicial review at all. The shipper could not bring an enforcement action—he had no order in his favor to enforce. This Court was required to balance the policy against injecting the agency as a party to a reparations case (the result if the shipper was permitted to sue to set aside the agency's order) against the policy in favor of permitting judicial review of final administrative orders. Here, there is no such hard choice to be made. The policy of allowing judicial review of agency orders may, in the case of an order granting reparations, be fully effectuated by remitting the carrier to defending against the order in the shipper's enforcement action.

This disposition at the same time fully effectuates the policy against injecting the agency as a party to reparations proceedings. Such is the accommodation that we urge here.

Respectfully submitted.

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